

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ALLAN TRACY GILMORE,

Petitioner,

vs.

TERRY GONZALEZ, Warden,

Respondent.

CASE NO. 11cv2463-MMA (DHB)

**ORDER DENYING MOTION AND
DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY**

[Doc. No. 22]

Petitioner Allan Tracy Gilmore, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to Title 28 of the United States Code, section 2254, challenging the constitutionality of his conviction on one count of petty theft with a prior. On September 14, 2012, the Court dismissed the petition without prejudice as second or successive in light of the proceedings recorded in Civil Case No. 07cv1823-DMS (JMA). *See* Doc. No. 19. Petitioner now requests the Court to issue a certificate of appealability. *See* Doc. No. 22.

Rule 11 of the Federal Rules Governing Section 2254 Cases states that “the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability (“COA”) is not issued unless there is “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a petition is, as here, dismissed on procedural grounds, a COA should be granted only if two elements are satisfied: (1) “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right”; and (2) “jurists of reason would find it debatable whether the

1 district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484-85
2 (2000). As each of these components is a “threshold inquiry,” the federal court “may find that it
3 can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue
4 whose answer is more apparent from the record and arguments.” *Id.* at 485. As the Court noted in
5 its order dismissing this action, a second or successive petition may not be filed in this Court
6 unless the petitioner first obtains from the United States Court of Appeals for the Ninth Circuit an
7 order authorizing this Court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). Petitioner
8 has not shown that jurists of reason would find anything debatable in the procedural ruling that the
9 petition is second or successive. Thus, the Court need not decide whether the application states a
10 valid constitutional claim. *See Id.* at 485.

11 Accordingly, the Court **DENIES** Petitioner’s motion and **DECLINES** to issue a certificate
12 of appealability in this case.

13 **IT IS SO ORDERED.**

14 DATED: October 16, 2012

A handwritten signature in cursive script, reading "Michael M. Anello", written in black ink.

Hon. Michael M. Anello
United States District Judge